88-540

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

MARK VANNELLI,

Petitioner,

vs.

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA AND MINNESOTA COURT OF APPEALS

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September, 1988

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QUESTION PRESENTED

Do student-athletes have standing under the "business *or* property" provision of Section 4 of the Clayton Act? (emphasis added herein)

PARTIES TO THIS PROCEEDING

The school, Northern Michigan University ("NMU") is not a party to this proceeding. The common law claims are pending against NMU in the State Court.

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NO. ———

MARK VANNELLI,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA AND MINNESOTA COURT OF APPEALS

OPINIONS BELOW

Petitioner has no knowledge of any "official" or "unofficial" reports of any of the opinions of the courts below. The United States District Court did not write an opinion.

JURISDICTION

The Minnesota Supreme Court denied a Petition for Review on June 29, 1988. This Petition was filed within 90 days thereof. The Minnesota Court of Appeals filed its opinion [unpublished] on April 19, 1988. The United States District Court for the District of Minnesota issued its Order for the NCAA on September 26, 1985, and amended it by an Order *Nunc Pro Tunc* on December 4, 1985. The United States District Court denied, as untimely, Petitioner's Rule 60 motion for reconsideration filed after the State Court applied collateral estoppel. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

STATUTORY PROVISIONS

Section 4, Clayton Act. (October 15, 1914, Chap. 323, Sec. 4, Stat. 731, 15 U.S. Code, Sec. 15.)

Sec. 4. "That *any person* who shall be *injured* in his *business or property* . . ." [emphasis herein]

Minnesota Antitrust Law, 325 D.57. ". . . any person injured . . ."

STATEMENT OF THE CASE

Petitioner was a high school hockey player in Minnesota in 1980 when he was recruited by Northern Michigan University ("NMU"). He was induced to sign with NMU by the usual promise of a 4-year scholarship plus the incentive of playing at an NCAA Division I school at a professional development level. He signed on April 15, 1980 at 10:30 p.m. what the NCAA titles a "National Letter of Intent," and a "Financial Assistance" form. In the fall of 1981, the coach "cut" him

from the team and told him his scholarship would terminate that academic year. [no fault of his own]

To preserve his playing development and to earn another scholarship and to meet NCAA time restraints on eligibility after his transfer, Petitioner had to leave NMU immediately. He contacted the University of Minnesota [an NCAA Division I member] hockey coach but was told NCAA Rules restricted his eligibility and so no athletic scholarship/financial aid could be given to him for a year when he would be fully eligible to play varsity hockey. The NCAA Rules barred him from championships thus *effectively* excluding him for a year. Thus, not being a "free agent" able to bargain for his playing services, he enrolled in St. Thomas College in St. Paul, Minnesota, at only an NCAA Division III level of competition, where he began playing the next season but without athletic financial aid.

Petitioner first sued in Federal Court, but because of the dismissal of NMU under the Eleventh Amendment, filed against both defendants over in State Court in the interest of judicial economy. The defendants quickly moved for summary judgment on collateral estoppel, based on the State Antitrust Law being held to be identically applicable as the Federal Antitrust Law. The State Courts so held.

Petitioner claims that the NCAA restrictions on his transfer rights injured him in *both* his "business" (athletic services) and his "property" (lessened his athletic earning power for paying his schooling expenses and increased his out-of-pocket costs of his schooling). He also suffered common law damages, such as emotional distress and defamation, in addition to the antitrust damages to his "business or property."

ARGUMENT

The time is "ripe" for this Court to decide this question. This case gained national attention in the Sports Section of *The New York Times*, Monday, November 24, 1986, in a by-line story.

Professor Arthur Miller of the Harvard Law School conducted a mock trial on the subject on his television show titled "Headlines On Trial," from Washington, D.C. on November 26, 1987. He introduced the issue as follows:

> ". . . *for college athletes sport is hard work for which there is no pay—or is there?* . . . Big time college athletics is big business . . . athletes are amateurs in name only . . . *scholarships are payments tied to performance . . .*" (emphasis herein) [Petitioner has a tape of the show available for this Court.]

In 1988, Hollywood released an exploitive movie on the subject, titled "Johnny Be Good," including a ridiculing depiction of the NCAA recruiting system.

On national television, Saturday, September 17, 1988, the University of *Michigan* demonstrated at half-time how it had arranged for 25 to 35 of the top high school players across the country to watch, on television, Michigan's big home-opener with number one ranked Miami [whose star quarterback was recruited out of Petitioner's hometown, St. Paul, Minnesota]. A Michigan recruiter talked "live" on the phone on television with one of the prospects and assured the public it was all within NCAA Rules.

The remarks over the telephone by Petitioner's coach at NMU to this attorney for Petitioner, in 1981, condemned the punishing restraint by the NCAA on Petitioner:

". . . The NCAA *rule is atrocious* . . . He'll have to sit out a year or sixteen weeks depending on what kind of school he goes to . . . That's a tremendous injustice . . . I will photocopy the NCAA manual . . . The kid is left with no alternative . . . He's got to preserve two things, one, academics and two, his athletic ability . . . He should be allowed to play immediately . . . because it's not his choice to transfer . . . In essence we're punishing the boy by not renewing . . . so the boy's being punished by the NCAA by not being allowed to play . . . I don't think in a, in a, *in a court that if the NCAA were ever tested on that, that they would have a leg to stand on.* But it's like so many rules that they have that just aren't tested for any number of reasons." (emphasis added herein)

Obviously, the NCAA cannot withstand scrutiny under the "rule of reason," should standing be afforded student-athletes here.

The two key provisions of the NCAA Rules are set forth here for attention and ease of reference as follows:

(1) "PLAY-FOR-PAY"
("Quid Pro Quo")

NCAA Constitution 3-4-(d) (1979-80):

"Where the student-athlete's *ability is taken into consideration in any degree in awarding unearned financial aid,* such aid shall not be awarded for a period in excess of one academic year;" [A25] (emphasis herein)

(2) RESTRICTED TRANSFER

NCAA By-laws, 5-1-(j)-(7) (1981-82):

"A transfer student from a four-year institution shall not be eligible for any NCAA championship until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full

Many student-athletes play to pay for their education which their parents could not otherwise afford. *Eg. New York Times*, July 23, 1987, page Y43, "Recruiting Pressure Extends To Women" ($13,000 per year). In *The St. Paul Pioneer Press Dispatch*, (Minnesota), March 15, 1988, page 3C, sports columnist Charley Walters reported that a local high school athlete had "accepted a baseball tender from U.S.C. valued at $90,000 for four years."

CONCLUSION

With regard to *schools*, this Court decided *NCAA v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948 (1984). With regard to *coaches*, this Court is presently considering *NCAA v. Jerry Tarkanian*, No. 87-1061, October Term, 1987. Therefore, with regard to *student-athletes*, this Court should grant this Petition and decide the standing issue. The issue is important enough as a matter of national impact and interest. The NCAA has not corrected the injustice of its Rules to this date.

The issue is as concisely presented for student-athletes in this case as it was for consumers in *Reiter v. Sonotone*. May this Court please see fit to grant this Petition.

Dated: September, 1988.

Respectfully submitted,

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APPENDIX

STATE OF MINNESOTA
IN SUPREME COURT

C3-87-2039

MARK VANNELLI,

Appellant,

vs.

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,

Respondents.

ORDER

Based upon all the files, records and proceedings herein, IT IS HEREBY ORDERED that the petition of Mark Vannelli for further review be, and the same is, denied.

Dated: June 29, 1988.

By the Court:
G. E. KELLEY
Associate Justice

STATE OF MINNESOTA
IN COURT OF APPEALS

C3-87-2039

(Title of Cause)

Filed April 19, 1988
Office of Appellate Courts

Heard, considered and decided by Norton, Presiding Judge, Kalitowski, Judge, and Schultz, Judge.*

NONPUBLISHED OPINION

NORTON, Judge

[Some facts omitted herein.]

* * *

The federal court dismissed all of appellant's claims. It reached the merits of only the constitutional and federal antitrust claims against the NCAA, holding that the NCAA's actions were not "state actions" and therefore were not subject to constitutional challenge, and that appellant lacked standing to assert claims under the federal antitrust laws in that he had not been "injured in his 'business or property' " within the meaning of those laws. The court declined to exercise pendant jurisdiction over appellant's common law and state antitrust claims against the NCAA and dismissed them without prejudice. Vannelli has not appealed that decision.

Appellant then filed the present action in state court, asserting virtually the same claims of fraud, breach of contract, tortious interference, and violation of state antitrust laws as

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* Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. 6, § 2.

had been dismissed. By a March 3, 1987 order the trial court granted summary judgment in favor of the NCAA on all counts.

* * *

DECISION

Summary judgment is appropriate where no material fact issues are presented and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. A party may not rest on his pleadings to create fact issues where the movant has provided affidavits in support of the motion. *Eakman v. Brutger*, 285 N.W.2d 95 (Minn. 1979).

[Common law claims omitted herein.]

* * *

Appellant urges reversal of the trial court's ruling that he is collaterally estopped from asserting the state antitrust claims.

Appellant claims that because the phrase "business or property" is missing from Minn. Stat. § 325D.57 (1986), the state antitrust law differs from the similar federal antitrust law. The Minnesota statute provides that any person "injured" by a violation of the Minnesota Antitrust Law of 1971 may recover damages. Respondent points out that numerous state and federal court decisions in Minnesota have routinely construed the Minnesota statute to follow the corresponding federal law. Appellant has not provided us with any legislative history showing the judiciary should interpret state law differently from federal law, notwithstanding the minor difference in language. Additionally in this case, it is logical to conclude that if appellant was not injured in his business or property, he was not injured at all. The premise of this

lawsuit is appellant's assertion that he was restricted by NCAA rules from freely selling his amateur athletic services.

Affirmed.

4-8-88

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-84-1680

(Title of Cause)

ORDER NUNC PRO TUNC

The above-captioned matter has been considered by the Court on the Motion of the Plaintiff, Mark Vannelli, under Rules 59 and 60 of the Federal Rules of Civil Procedure for relief from prior Orders of this Court dated September 26, 1985 and September 30, 1985. Based on the entire record in this matter,

IT IS ORDERED that the Order dated September 26, 1985 is hereby amended and corrected to remove the claims alleged under the Minnesota Antitrust Law (Minn. Stat. §325.49, et seq.) from the summary judgment granted in paragraph 1 of the Order.

IT IS FURTHER ORDERED that the Minnesota Antitrust claims are dismissed without prejudice as pendent state law claims.

Dated: December 4, 1985.

ROBERT G. RENNER
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-84-1680

(Title of Cause)

ORDER

The captioned matter came on for hearing before the undersigned on September 25, 1985, on the motion of defendant National Collegiate Athletic Association ("NCAA") for dismissal and/or summary judgment as to the claims against it. John F. Beukema and John D. French appeared for defendant NCAA. John E. Thomas appeared for plaintiff.

Based on the memoranda and affidavits submitted by the parties and the arguments of counsel, the Court has determined that the relief requested by defendant NCAA should be granted, as follows:

1. Summary judgment is hereby granted in favor of defendant NCAA with respect to Counts I and II of the Complaint, asserting violations of sections 1 and 2 of the Sherman Act (15 U.S.C. §§1-2) and the Minnesota Antitrust Law (Minn. Stat. § 325D.49, *et seq.*), because the plaintiff was not injured in his "business or property" within the meaning of those statutes and therefore lacks standing to assert claims thereunder.

2. Summary judgment is hereby granted in favor of defendant NCAA with respect to Count VI of the Complaint, asserting violations of the Fourteenth Amendment of the United States Constitution, because the actions of the NCAA do not constitute "state action".

3. Counts III, IV, and V of the Complaint, asserting state common law claims, are dismissed without prejudice, inasmuch as this Court lacks subject matter jurisdiction over said claims.

IT IS SO ORDERED.

Dated: September 26, 1985.

ROBERT G. RENNER
United States District Judge

Transcript of proceedings (partial) had in the above-entitled matter before the Honorable Robert G. Renner, U.S. District Court, St. Paul, Minnesota, September 25, 1985.

* * *

As to the antitrust claim. The NCAA argues that plaintiff's complaint fails to state a claim under the antitrust laws. The NCAA first argues that plaintiff lacks standing under the antitrust laws. Section 4 of the Clayton Act, 15 USC, Section 15, confers standing to bring an antitrust action. It provides "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States."

Now, the defendant argues that plaintiff lacks standing as an amateur student athlete, because he can't show any injury to his business or property. Plaintiff cites an Eighth Circuit case, Scott versus City of Sioux City, Iowa, which does not involve antitrust standing requirements, but discusses the state's immunity under the antitrust laws. See 736 F.2d 1207.

Plaintiff also cites Judge Larson's opinion mentioned extensively during argument, which is not an antitrust case, but a constitutional case. Moreover, it focuses on the opportunity to obtain an education, not an issue involved here.

Plaintiff argues that the requisite injury is here. He contends that there has been a definite factual showing of commercial activity by plaintiff Vannelli in playing Division I NCAA hockey.

This troubles the Court, because it's difficult for the Court to understand how amateur hockey is commercial as to the players. They cannot accept money, et cetera, for their play. But plaintiff counters this by arguing that because the scholarship was taken away, Vannelli had to pay more for his education than before.

The Court is troubled by this for several reasons. One, we find that, admittedly, the defendant gave up his year of scholarship, whereas he could have stayed at NMU for his second year. He left in mid year. Also, the Court has very grave difficulty understanding how NCAA could be in any way responsible for the decision. It is true that the play for pay provision in the NCAA constitution provides a scholarship for no more than one year, but it is also true that it provides for no less than one year. And, to the Court, it doesn't appear to be arbitrary that the association colleges, through its organization, NCAA, should have the right to establish the length of such scholarships.

The plaintiff argues that he was deprived of his right to play in championship games under the NCAA rule, whereas in fact we find he transferred to a school, St. Thomas, which was not even that year playing in NCAA tournaments by its own decision to play NAIA championship schedules.

I have to dismiss the case on grounds of lack of standing. Having dismissed the antitrust claim and the constitutional claim, the Court now dismisses the state pendant claims.

Are there any questions?

MR. THOMAS: Would dismissal of the state pendant claims be without prejudice?

THE COURT: That would be without prejudice.

All right. I will order the defendants to prepare orders individually in the light of my order so the Court can file the same.

That will be all.